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EXAMINER

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.



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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/697,465  
Filing Date: October 30, 2003  
Appellant(s): GRIFFIN ET AL.

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Robert A. Ambrose  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed July 02, 2007 appealing from the Office action mailed November 30, 2006.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

|              |                   |        |
|--------------|-------------------|--------|
| 5,804,021    | ABUTO et al.      | 9-1998 |
| 2004/0121110 | SCHMIDT ET AL.    | 6-2004 |
| 2005/0079987 | CARTWRIGHT ET AL. | 4-2005 |

### **(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

Claims 11-22 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over ABUTO et al. (US 5,804,021).

With regard to claims 11 and 17, Abuto et al. disclose a fibrous nonwoven laminate that exhibits elastic properties in at least one direction (Abstract). The facing layer comprises a continuous fiber spunbonded web made from bicomponent fibers (column 7, lines 25-44). The web may be thermally point bonded in a pattern (column 9, lines 30-33). The web is provided with extensibility in the cross machine direction by forming slits that are parallel to the machine direction (See Figures 1 and 2). In its unstretched condition, the web appears to have a uniform basis weight, since there is no pattern of varying density or weight. Abuto et al. do not specify a fiber diameter in microns for the spunbonded web. However, spunbonded fibers are generally greater than 10 microns, unless otherwise specified as fine fiber spunbond (See US 2004/0121110 to Schmidt et al. at paragraph 15). Also, Abuto et al. disclose using 2 denier polypropylene/polyester bicomponent fibers (Example 1, column 13, lines 57-58). Denier can be converted to fiber diameter in microns using the teachings in paragraph 28 of US 2005/0079987 to Cartwright et al. The density for polyester is 1.38 g/cc and the density for polyethylene is 0.95 g/cc (See Adanur, Wellington Sears Handbook of Industrial Textiles, at p. 563). Assuming a 50/50 ratio of materials (density averages to 1.165 g/cc), a 2-denier bicomponent fiber would have a fiber diameter of about 15.6

Art Unit: 1794

microns. Even if one were to assume a greater presence of polyester (which would produce a smaller fiber diameter) of up to 100/0 (density equals 1.38), the fiber diameter would still be about 14.3 microns. So it is clear that the fibers of Abuto et al. anticipate the claim limitation of fiber diameter greater than 10 microns. It is also noted that Abuto et al. teach the fiber denier is not limited to 2, but may be up to 6 denier (column 13, lines 3-4).

With regard to claims 11-13 and 17-19, although Abuto et al. do not explicitly teach the limitations of force required to stretch the web in the cross machine direction as compared to the force required to stretch the web in the machine direction, it is reasonable to presume that said limitations are inherent to the invention. The nonwoven web of Abuto et al. uses a spunbonded web with crimped fibers that is thermally point bonded in a pattern and it is processed so that it is capable of stretching in the cross machine direction. There may be some difference in the processing steps used to create the final product. However, even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product limitations for cross machine direction stretch. The burden is upon the Applicant to prove otherwise. In the alternative, the claimed limitations would obviously have been provided by the process disclosed by Abuto et al. because the reference teaches how to vary the stretching capability of the fabric (See column 11, line 64 - column 12, line 56).

Art Unit: 1794

Note *In re Best*, 195 USPQ 433, footnote 4 (CCPA 1977) as to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102.

With regard to claims 14 and 20, the fibers of the web are provided with latent crimps (column 8, lines 20-42). With regard to claims 15, 16, 21, and 22, the spunbonded web is bonded to an elastic film or nonwoven web (column 4, lines 27-30).

### **(10) Response to Argument**

Appellant argue that the term "consisting essentially of" as applied to the present claims limits the claims to materials which do not undergo post processing and further argue that the ABUTO et al. reference provide for the extensibility to be increased because the webs contain a plurality of slits through the nonwoven material. Appellants further argue that the provision of the plurality of slits would produce a fibrous nonwoven web having at least a substantial number of discontinuous fibers at the slits.

"Consisting essentially of" does not mean "consisting of"; "adjacent" has a broader meaning than "side by side."—Ex parte Appeldorn & Gilkeson (PO BdApp) 159 USPQ 791. As previously noted, the arguments that the material claimed herein is distinguished from the material of Abuto since the material does not have to undergo additional post processing is not persuasive as the present claims are article claims and are not directed to a process. The slits provided by ABUTO do not take away from the basic and novel characteristics of the web claimed in the present invention. If an applicant contends that additional steps or materials in the prior art are excluded by the recitation of "consisting essentially of," applicant has the burden of showing that the introduction of additional steps or components would materially change the

Art Unit: 1794

characteristics of applicant's invention. In re De Lajarte, 337 F.2d 870, 143 USPQ 256 (CCPA 1964). See also Ex parte Hoffman, 12 USPQ2d 1061, 1063-64 (Bd. Pat. App. & Inter. 1989). It is the Examiner's interpretation that the slits provided by the ABUTO et al. reference would not materially change the characteristics of applicant's invention. It is noted that the filaments in the material taught by ABUTO et al. are continuous fibers and the present invention does not define the length of the claimed continuous fibers as to make the assertion that by providing slits such limitation would not be met. Even if Appellants had defined "continuous fibers" in terms of, for example, the length of the fibers the language "consisting essentially of" does not mean "consisting of" as to preclude the presence of the argued "discontinuous fibers" due to the presence of slits. It is further noted that the slits provided in the reference are in the machine direction, parallel to the direction of the spunbonded filaments, therefore, the presence of such slits will not affect the strength of the material in that direction and accordingly, there will be no significant discontinuity in the fibers running in that direction. It is the Examiner's position that the "essentially consisting of" does not preclude the slits provided by the prior art of record and that there is no material difference in the structure claimed in the present invention and the material taught by ABUTO et al.

#### **(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

Art Unit: 1794

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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